

In the matter of:

Area-Wide Investigation of
Contamination from
Phosphate Mining in
Southeastern Idaho

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CONSENT ORDER/
ADMINISTRATIVE ORDER
ON CONSENT

I. PARTIES

The Idaho Department of Environmental Quality ("IDEQ"), the United States Environmental Protection Agency ("EPA"), the United States Department of Agriculture ("USDA"), U.S. Forest Service ("USFS"), and the United States Department of Interior ("USDO"), Bureau of Land Management ("BLM"), U.S. Fish and Wildlife Service ("USFWS"), Bureau of Indian Affairs ("BIA") and the Shoshone-Bannock Indian Tribes, (collectively referred to as the "Agencies") hereby enter into this Consent Order/Administrative Order on Consent ("CO/AOC") with J.R. Simplot Company, Nu-West Industries, Inc., Rhodia, Inc., FMC Corporation, P4 Production, L.L.C., (collectively referred to as the "Companies").

II. PURPOSE AND SCOPE OF AGREEMENT

The purpose and scope of this CO/AOC is to identify procedures to be used to ensure the recovery of costs incurred by the IDEQ's performance or oversight and review, and EPA's¹, USFWS's and the Tribes' oversight and review of an Area-Wide Investigation into contamination from phosphate mining operations in Southeast Idaho. The activities for which performance or oversight costs are to be recovered are more particularly set forth in the Scope of Work ("SOW") attached hereto as Exhibit "A," which is incorporated herein by reference.

¹ Included as part of EPA's costs will be costs associated with the Agency for Toxic Substances and Disease Registry's (ATSDR's) activities under the CO/AOC.



III. LIMITATION OF SCOPE

Nothing herein shall be deemed to affect or govern any of the parties' rights, duties or obligations with respect to the identification, remediation, or clean up of any specific site. Each and every Party hereto reserves all claims, rights, causes of action and defenses with respect to any and all specific sites.

IV. AUTHORITIES

The Statements of Authority set forth below shall not be construed to restrict, enlarge, or otherwise determine the rights, interests and jurisdiction of the United States, the State of Idaho, or the Shoshone-Bannock Tribes, or any of their respective departments, agencies or members. Nor shall any statements made herein be construed to represent an admission, determination, settlement or adjudication of any legal or factual dispute relating to any Party's rights, privileges, interests, authority or jurisdiction. Each and every Party hereto reserves all claims, rights, causes of action and defenses with respect to any claim of jurisdiction expressed herein.

1. FEDERAL AUTHORITY. Pursuant to Executive Order 12580, as amended by Executive Order 13016, the President delegated the authority to conduct various activities and recover costs under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") to several executive departments and agencies, including EPA, USDA, and DOI. Such response activities include investigations and response activities (42 U.S.C. § 9604), cost recovery (42 U.S.C. § 9607), issuing such orders as may be necessary to protect public health or welfare or the environment (42 U.S.C. § 9606(a)), and entering into agreements with a potentially responsible Party ("PRP") for the PRP to perform investigations (42 U.S.C. § 9622(d)(3)).
2. STATE AUTHORITY. IDEQ is the Idaho state agency that generally has authority over the identification, investigation and clean-up of facilities where hazardous substances have come to be located in the State of Idaho. IDEQ exercises this authority pursuant to the Idaho Environmental Protection and Health Act ("EPHA"), Idaho Code §§ 39-101 to 39-130, and the Hazardous Waste Management Act of 1983 ("HWMA"), Idaho Code §§ 39-4401 to 39-4432. IDEQ is the Idaho state agency with the authority to participate in the initiation and development of CERCLA response actions to be undertaken in the State of Idaho. Pursuant to Idaho Code § 39-108(b) and § 39-4414(2), IDEQ is entitled to recover from liable parties its reasonable costs associated with any violation of any permit, standard or regulation, including the costs of any non-routine investigation.
3. TRIBAL AUTHORITIES. The Shoshone-Bannock Tribes ("Tribes") are federally recognized Indian tribes with a governing body known as the Fort Hall Business Council,

which has authority to enter into this CO/AOC on behalf of the Tribes. The Tribes have authority over the identification, investigation, and cleanup of hazardous substances found within Indian Country, including on the Reservation. The Tribes exercise their authority pursuant to, among other authorities, CERCLA, their inherent sovereign powers, the Fort Bridger Treaty, the Constitution and Bylaws of 1936, and various provisions of the Land Use Policy Ordinance, the Law and Order Code of 1982, and the 1994 Fort Hall Water Rights Agreement. Pursuant to CERCLA the Tribes can recover from liable parties all costs incurred for actions taken in response to the release or threatened release of hazardous substances that are not inconsistent with the National Contingency Plan ("NCP").

V. FACTUAL BACKGROUND

Elevated concentrations of selenium and other hazardous substances, pollutants and contaminants have been identified in water, soil, vegetation and wildlife associated with current or former phosphate mining operations in southeastern Idaho. The IDEQ has determined that these elevated levels of selenium, and other hazardous substances, pollutants and contaminants are a violation of the standards, rules and regulations established pursuant to Idaho Code §§ 39-101 et seq. and 39-4401 et seq. The Companies dispute this assertion.

The approximate extent of currently known past and present phosphate mining operations in this region (the "Mining Area") is indicated on the map attached hereto for informational purposes as Exhibit B, and includes areas located variously on federal land, tribal land, private land, state land, or a mixture of these types of ownership or jurisdictional areas. Individual phosphate mining operations located within the Mining Area also are listed in Exhibit B.

The Agencies and the Companies have incurred and will continue to incur costs in responding to the release and threat of release of hazardous substances in the Mining Area. The Companies and other entities may be liable for some or all of those response costs.

Effective July 15, 2000, the Agencies entered into a Memorandum of Understanding ("MOU"). The MOU provides a framework for the coordination of the actions and authorities of the parties to the MOU. Under the terms of the MOU, IDEQ is designated the lead agency with respect to the Area-Wide Investigation; coordination with the other parties to the MOU is expected to occur pursuant to the terms of the MOU. The scope of the Area-Wide Investigation is set forth in the SOW.

VI.
AGREEMENT TO REIMBURSE COSTS
ASSOCIATED WITH AREA-WIDE INVESTIGATION

1. Without admitting any liability and expressly reserving all claims and defenses except as specifically waived herein, the parties hereto mutually agree as follows:

2. The parties hereby mutually waive any and all claims for past costs incurred by them in connection with the Area-Wide Investigation conducted by the Selenium Working Group of the Idaho Mining Association ("Working Group") regarding the release of selenium or other contaminants as a result of phosphate mining in the Mining Area. The term "past costs" as used herein shall mean such Working Group costs incurred prior to August 1, 2000. Past costs do not include costs incurred by any of the parties for work conducted outside the Working Group relating to the release of selenium or other contaminants as a result of phosphate mining in the Mining Area, or the costs described in Paragraph 3, below.

3. The Parties and the United States Department of Justice ("DOJ"), on behalf of all the Federal Agencies and the Tribes, hereby reserve all claims for response costs, both past and future, associated with site-specific investigations or incurred in connection with the Area-Wide Investigation and not reimbursed or waived pursuant to the terms of this CO/AOC. Site-specific past costs include, but are not limited to, costs attributable to the South Maybe Canyon Mine Site, which is the subject of a June 8, 1998 Administrative Order on Consent between the Forest Service and Nu-West Industries, Inc. and Nu-West Mining, Inc. and costs incurred in connection with preliminary assessments and PRP searches for specific phosphate mining sites.

4. The Mining Companies assert that claims for cost recovery by certain Federal Agencies may be barred or diminished pursuant to Section 113 and/or Section 120 of CERCLA (42 USC § 9613, 9620). The Federal Agencies and Tribes dispute this assertion. The Mining Companies expressly reserve any and all claims and/or defenses based on these provisions.

5. IDEQ Cost Recovery Procedures: Subject to the funding commitments set forth below, the Companies hereby agree to reimburse IDEQ for its reasonable costs incurred by IDEQ in connection with performance, oversight and review of the items set forth and described in the SOW as provided herein.

a. Funding Commitment: The Companies hereby agree to commit the sum of up to five million dollars (\$5,000,000.00) over a ten (10) year period commencing on the date following signature of this agreement for the purpose of reimbursing IDEQ for all of its reasonable costs incurred in the performance of the work identified in the SOW. Said funds shall be made available to IDEQ as follows:

1. Year One: Up to one million dollars (\$1,000,000.00)

2. Year Two: Up to one million dollars (\$1,000,000.00)
3. Years Three through Ten: Up to Three Hundred Seventy Five Thousand dollars (\$375,000.00) per year.

b. If any of the amounts of funding set forth in paragraph 5.a. of this section are not utilized in a given fiscal year, such surplus funding shall be made available in subsequent fiscal years within the ten (10) year project life set forth above.

c. The funding commitments set forth above shall not be deemed to constitute a waiver by the State of Idaho, or IDEQ of any claim or right or cause of action to recover amounts in addition to the amounts set forth above and IDEQ hereby expressly reserves the right to recover amounts which exceed the funding commitments set forth above in accordance with the procedure set forth in paragraph 5.d. of this section.

d. If during any fiscal year the amount sought by IDEQ under this CO exceeds the annual or decennial funding commitments of the Companies expressed herein, the IDEQ shall submit a supplemental request for payment to the Companies setting forth the amounts sought in excess of the funding commitments set forth above and a detailed explanation of the reasons for such exceedence. Within thirty (30) days of receipt of the Supplemental Request the Companies must either agree to payment of the Supplemental Request for payment, or deny the supplemental request for payment. Any denial, must set forth a detailed explanation upon which the Companies predicate denial. Any denial of a request for supplemental payment is subject to the informal dispute resolution provisions contained herein but not formal dispute resolution. Any such supplemental request for payment shall not obligate the Companies to make payment. IDEQ reserves the right to institute a civil action for the recovery of these costs pursuant to Idaho Code § 39-108(b) and § 39-4414(2).

e. Budget, Billing and Payment Procedures: Not later than June 30 of each year, IDEQ shall submit to the Companies estimated annual budgets (Annual Budget Estimate) for the costs and expenditures associated with performance, oversight and review of the work outlined in the SOW expected to be incurred by IDEQ in the following fiscal year. The Companies shall have 30 days after receipt of the Annual Budget Estimate within which to submit comments or object to items contained in the Annual Budget Estimate.

f. The Annual Budget Estimate shall not be binding upon any Party. The Annual Budget Estimate shall serve solely as an estimate of reasonably foreseeable costs and expenditures. IDEQ shall not be limited by any amount set forth in the Annual Budget Estimate, and shall not be required to expend the specific amounts set forth therein.

g. Within thirty (30) days after the end of each fiscal quarter, IDEQ shall provide the Companies with detailed statements of expenditures made during the fiscal quarter. Such expenditures shall be in accordance with the authorities of IDEQ as set forth in paragraph IV herein. Subject to the limitations on amounts set forth above the Companies shall remit payment for these expenditures to IDEQ within thirty (30) days of receipt of IDEQ's statement of expenditures.

h. If the Companies dispute any amounts set forth in the statement of expenditures, the Companies shall remit payment for all sums not in dispute. Thereafter, any disputes concerning an amount owed by the Companies shall be resolved through the dispute resolution process set forth in Section XII of this CO/AOC. If resolution of a dispute results in any portion of the disputed sum being awarded to IDEQ, the Companies shall within fifteen (15) days after receipt of the final decision: (i) remit the amount awarded plus interest accruing at the statutory rate for interest on judgments from the date originally due; or (ii) proceed with other legal remedies in accordance with Section XII herein.

6. Federal Costs: The Companies hereby agree to reimburse the EPA and USFWS for their "Oversight Costs" as defined herein.

a. Definition of Oversight Costs. "Oversight Costs" shall mean all direct and indirect costs incurred by the EPA, USFWS in connection with their oversight and review of the Work performed by or on behalf of IDEQ under this CO/AOC after its effective date as set forth and described in the SOW, including, but not limited to, time and travel costs of EPA and USFWS personnel associated with oversight of the work performed under the SOW; contractor costs; federal inter-agency agreement costs; compliance monitoring, including the collection and analysis of split samples; site visits; discussions regarding disputes that may arise under this CO/AOC; review and approval or disapproval of reports; and any other costs directly incurred in overseeing this CO/AOC.

b. Federal Payment Procedure. EPA and USFWS each will submit to the Companies annual bills and supporting cost summaries for Oversight Costs incurred during the billing period. The first bills for Oversight Costs shall be issued no sooner than ninety (90) days after the effective date of this CO/AOC. The Companies shall remit payment for these expenditures to the billing entity (EPA or USFWS) within thirty (30) days of receipt of the BILL.

Payments to EPA shall be made by certified or cashier's check made payable to EPA Hazardous Substance Superfund. Each check shall reference the name and address of the Party making payment, the Area-Wide Investigation, the EPA Region 10 number (106R), and shall be sent to:

EPA Superfund
Region 10
1200 Sixth Avenue, DMP-146
Seattle, WA 98101.

The Companies shall simultaneously transmit a copy of the check to:

Financial Management Officer
Region 10
1200 Sixth Avenue, OMP-146
Seattle, WA 98101

Payments to USFWS shall be made by certified or cashier's check made payable to the United States Fish and Wildlife Service and mailed to:

U.S. Fish & Wildlife Service
ATTN: Debra Freeman
911 N.E. 11th Avenue
Portland, OR 97232-4181

If the Companies dispute any amounts set forth in a statement of expenditures, the Companies shall remit payment for all sums not in dispute. Thereafter, any disputes concerning an amount owed by the Companies shall be resolved through the dispute resolution process set forth in Section XII of this CO/AOC. If resolution of a dispute results in any portion of the disputed sum being awarded to EPA, USFWS, the Companies shall within fifteen (15) days after receipt of the final decision: (i) remit the amount awarded plus interest accruing at the statutory rate for interest on judgments from the date originally due; or (ii) proceed with other legal remedies in accordance with Section XII herein.

c. Interest. In the event that any payment required by paragraph 6(a) is not made when due, interest shall accrue on the unpaid balance. Interest shall continue to accrue on the unpaid balance through the date of payment. "Interest" shall mean interest at the current rate specified for interest on investments of the Hazardous Substance Superfund established by 26 USC 9507, compounded annually on October 1 of each year, in accordance with 42 USC § 9607(a). Payments of interest shall be in addition to such other remedies or sanctions available to the Federal Agencies by virtue of the Companies' failure to make timely payments under this section. Payments required by this paragraph shall be made in the same manner described in paragraph 6(b) above.

7. Tribal Costs: The Companies hereby agree to commit to the sum of up to Sixty-Five Thousand Dollars (\$65,000) per year for a three (3) year period commencing on the date following complete execution of this agreement for the purpose of providing support for a full time position for a Selenium Project Manager, including fringe benefits and said Manager's reasonable costs and expenditures, to perform the oversight, investigation and review of work in the area-wide scope of work and site specific work. If the annual funding amount is not utilized in a given fiscal year, such surplus funding shall be made available in subsequent fiscal years during the three (3) year period referenced above. Unless terminated by the Companies, this

agreement shall automatically renew upon expiration of the three year term for an additional three (3) year term under the same terms and conditions set forth herein.

a. Budget, Billing and Payment Procedures: Not later than July 30th of each year, the Tribes shall submit to the Companies an estimated annual budget for the salary and costs associated with the Selenium Project Manager which shall not exceed Sixty-Five Thousand Dollars (\$65,000). The annual estimates shall not be binding on any Party. The annual estimates for costs and expenditures shall serve solely as an estimate of reasonably foreseeable costs and expenditures. The Tribes shall not be limited by the estimates of costs and expenditures, and shall not be required to expend the specific amounts set forth in the annual budget provided to the Companies. The Companies shall have 30 days after receipt of the Tribes' estimated annual budget within which to submit comments or object to items contained in the annual budget. If there are objections by the Companies, the parties shall proceed in accordance with paragraph 7.b. herein. If there are no objections by the Companies, the Companies shall remit payment of the annual salary, and within thirty (30) days after the end of each fiscal quarter, the Tribes shall provide the Companies with statements of expenditures made during the fiscal quarter. Such expenditures shall be in accordance with the authorities of the Tribes as set forth in Section IV herein. Subject to the limitations on amounts set forth above, the Companies shall remit payment for these expenditures to the Tribes within thirty (30) days of receipt of the Tribes' statement of expenditures.

b. Dispute of any amount: If the Companies dispute any amounts set forth in the statements of expenditures, the Companies shall remit payment for all sums not in dispute. Any disputes concerning an amount owed by the Companies to the Tribes shall be resolved through the dispute resolution process set forth in Section XII of this CO/AOC. If resolution of a dispute results in any portion of the disputed sum being awarded to the Tribes, the Companies shall within fifteen (15) days after receipt of the final decision: (i) remit the amount awarded plus interest accruing at the statutory rate for interest on judgments from the date originally due; or (ii) proceed with other legal remedies in accordance with Section XII herein.

c. Interest: In the event that any payment required in paragraph 7.b. is not made when due, interest shall accrue on the unpaid balance. Interest shall continue to accrue on the unpaid balance through the date of payment. "Interest" shall mean interest at the current rate specified for interest on investments of the Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). Payments of interest shall be in addition to such other remedies or sanctions available to the Tribes by virtue of the Companies' failure to make timely payments under this section.

VII.
DELEGATION AND ASSIGNMENT OF RESPONSIBILITY

It is the purpose and intent of IDEQ as lead agency to utilize cost efficient and expedient measures in performance of this CO/AOC and the attached SOW. IDEQ, or its designated contractor, shall have the primary responsibility for performing the tasks and subtasks described in the attached SOW. The IDEQ shall determine, in consultation with the Federal Agencies and the Tribes, appropriate resources for the performance of the tasks and subtasks described in the attached SOW. This may include assignment of tasks to the Mining Companies and their selected contractors, where appropriate, based upon consideration of efficiency and available resources. The Federal Agencies and the Tribes shall participate in decisions regarding such assignments and oversee such work as provided in the Memorandum of Understanding described in Section V above. All work assigned to the Mining Companies will be performed pursuant to enforceable agreements that will be separately executed and made subject to this CO/AOC. Nothing in this section or in the Scope of Work shall, in any way, limit the authority or the ability of the IDEQ to collect samples or take any actions necessary for completion of the Area-Wide Investigation, the provisions of the CO/AOC or the Scope of Work, which the IDEQ, in its discretion, determines are necessary and appropriate.

VIII.
CONSISTENCY WITH NATIONAL CONTINGENCY PLAN

All work implemented or required under this CO/AOC and the SOW shall be conducted in a manner which is not inconsistent with the National Oil and Hazardous Substances Pollution Contingency Plan ("NCP"), 40 C.F.R. Part 300, including without limitation 40 C.F.R. Subpart H. (40 C.F.R. § 300.415, and § 300.700).

IX.
COMPLIANCE WITH OTHER LAWS

Except as set forth herein, this CO/AOC shall not relieve the Companies from their obligations to comply with any of the applicable provisions of and the Parties hereto specifically reserve all other rights under the EPHA; the HWMA; the Idaho Water Quality Standards and Wastewater Treatment Requirements, IDAPA 16.01.02.001 to 16.01.02.999; the Rules and Standards for Hazardous Waste, IDAPA 16.01.05.001 to 16.01.05.999; the Ground Water Quality Rule, IDAPA 16.01.11.001-16.01.11.999, CERCLA, 42 U.S.C. 9601- 9675 and any other applicable local, state, tribal or federal law.

X.
COORDINATION WITH SITE-SPECIFIC REMEDIAL ACTIONS

The parties contemplate that various site-specific investigations, risk assessments and possible remedial actions will or may be performed in the future on all or some of the individual mining operations listed in Exhibit B pursuant to the terms of negotiated Consent Orders/Administrative Orders on Consent. Because this Area-Wide investigation includes a general, region-wide risk assessment and planning for general remedial action objectives and measures that are intended to be used to facilitate, expedite and provide consistency for future site-specific work, the parties generally contemplate and intend that this Area-Wide Investigation will be closely coordinated and not performed in a duplicative or inconsistent manner with any site-specific work. By stating this general goal, however, IDEQ, the Federal Agencies and the Tribes do not waive or limit any of their authorities with respect to determining the scope of or schedule for either the Area-Wide Investigation or any site-specific work.

XI.
GENERAL PROVISIONS

1. Conflict Between Consent Order and Exhibits. To the extent of any conflict between the meaning of the terms and provisions in this CO/AOC and the Exhibits, the meaning in this CO/AOC shall control.
2. Modifications. This CO/AOC may be modified by the Parties' mutual agreement. Agreed modifications to the CO/AOC must be in writing signed by an authorized representative of each party.

IDEQ, the Federal Agencies and the Tribes reserve the right to modify the SOW pursuant to the Memorandum of Understanding among them, but the Mining Companies will not be obligated under this CO/AOC to pay for any increase in costs incurred by IDEQ, the Federal Agencies or the Tribes as a result of such modification, unless they agree to pay such increased costs in writing. IDEQ, the Federal Agencies and the Tribes nonetheless reserve the right to seek recovery of such increased costs from the Companies.

3. Notice. All communications required by this CO/AOC shall be addressed to:

IDEQ – Orville Greene, Administrator, Waste Management & Remediation
Division, Idaho Department of Environmental Quality, 1410 N. Hilton, Boise, ID
83706, 208-373-0445

EPA - Nick Ceto, U.S. Environmental Protection Agency, 1200 Sixth Avenue,
ECL 116, Seattle, WA 98101, (206) 553-1816

USDA/Forest Service - Forest Supervisor of the Caribou-Targhee National Forest

(currently Jerry Reese, 1405 Hollipark Dr., Idaho Falls, ID, 83401, (208) 557-5760)

BIA - Land Manager (currently Allen Sedik, CERCLA Coordinator, U.S. Department of the Interior, Bureau of Indian Affairs, 1849 C St., NW, MS 4513, Washington, DC, 20240, (202) 208-5474)

USFWS - Contaminants Specialist, Snake River Basin Office (currently Susan Burch, 1387 S. Vinnell Way, Room 368, Boise, ID 83709, (208) 378-5243)

TRIBES - Jeanette Wolfley, Tribal Attorney, Shoshone-Bannock Tribes, P.O. Box 306, Fort Hall, ID 83203, (208) 232-1922

DOI/BLM - District Manager, Upper Snake River District (currently Jim May 1405 Hollipark Drive, Idaho Falls, ID 83401, (208) 524-7500.

J. R. Simplot Company - Bruce Winegar, Frontier Bldg., 1130 W. Hwy. 30, Pocatello, ID 83204, (208) 235-5675.

Nu-West Industries, Inc. - Scott Sprague, Agrium U.S., Inc., 3010 Conda Rd., Soda Springs, ID 83276, (208) 543-4387.

Rhodia, Inc. - Dan Bersanti, Rhodia, Inc., P.O. Box 3146, Butte, MT, 59702, (406) 782-1215.

FMC Corporation - Rob Hartman, P.O. Box 4111, Pocatello, ID 83202, (208) 236-8658

P4 Production, L.L.C. - Robert Geddes, P.O. Box 816, Soda Springs Plant Highway 34 N., Soda Springs, ID 83276, (208) 547-4300.

4. Effect on Successors and Assigns. This CO/AOC shall bind the parties and their respective successors, agents, and assigns until such time as the terms of this CO/AOC are fully met.

5. Reservation of Natural Resource Damage Claims. Nothing herein shall be deemed to waive or compromise any claims, known or unknown, existing or potential for damages to natural resources whether in existence at the time of this CO/AOC or arising in the future.

6. State Tolling Agreement. The State of Idaho and the Companies expressly stipulate and agree that any statute of limitations applicable to any claims under CERCLA, EPHA, HWMA or any other applicable law, for natural resource damages or other damages to the environment, is hereby tolled as of the effective date hereof, until such time as this CO/AOC is terminated. IDEQ and Companies further stipulate and agree that this tolling provision is not intended to restrict IDEQ and Companies from enforcing their rights under this CO/AOC, or to limit the

time within which IDEQ and Companies may enforce such rights as provided in Idaho Code § 29-110. IDEQ and Companies further stipulate and agree that the IDEQ's right to pursue a claim for natural resource damages and the Companies' right to raise any defense to a natural resource damage claim are not rights created by or enforceable under this CO/AOC and, therefore, the tolling provision set forth herein is not prohibited by Idaho Code § 29-110.

7. Federal Tolling Agreement. The Companies and the Federal Agencies shall enter into a separate tolling agreement.

8. Tribal Tolling Agreement. The Companies and the Tribes shall enter into a separate tolling agreement.

9. Third Person's Rights Unaffected. Except as expressly provided herein, nothing in this CO/AOC shall be construed to create any rights in, or grant any cause of action to, the Parties or any person not a Party to this CO/AOC.

10. Effective Date. The effective date of this CO/AOC shall be the date of signature by the last of the Parties.

11. Authority. Each undersigned representative certifies that he or she is fully authorized to enter into the terms and conditions of this CO/AOC, and to execute and legally bind such Party to this document.

XII. DISPUTE RESOLUTION

Informal Resolution: It is understood that disputes may arise between the Companies and either a single agency participant or multiple agency participants regarding cost recovery items governed by this CO/AOC. The Companies and the Agency (or Agencies) shall attempt to resolve expeditiously and informally disputes that arise under this CO/AOC. An agreement to informally resolve a dispute reached by the Parties pursuant to this section shall be memorialized in writing, signed by both Parties, and shall, upon the signature of both parties, be incorporated into and become an enforceable element of this CO/AOC.

Formal Resolution: If, after consultation, the Companies and the Agency(ies) still cannot agree on disputed matters, the Companies and the Agency(ies) may initiate a Dispute Resolution Process by written request directed to each Party's representative identified in Section XI, Paragraph 3 above. This dispute resolution process shall apply only to disputes involving accounting errors in the calculation of amounts due, claims that costs billed are not within the categories of costs covered by this CO/AOC and/or alleged inconsistencies of response actions with the NCP.

The request for dispute resolution shall set forth the position of the requesting Party regarding the disputed matter, and include supporting data. The affected agency shall designate a Dispute

Reviewer who shall issue a decision regarding the disputed matter. The decision of the Dispute Reviewer shall be incorporated into and become an enforceable element of this CO/AOC upon the parties' receipt of the decision regarding the dispute.

Nothing in this Order precludes the parties from agreeing to use other forms of alternative dispute resolution.

Review of IDEQ Disputes: With respect to disputes involving IDEQ's costs, either Party may seek review of the Dispute Reviewer's decision in accordance with applicable law including initiation of a contested case pursuant to the Hazardous Waste Management Act and Rules for Contested Cases before the Idaho Department of Environmental Quality, IDAPA 58.05.03, et seq.

Review of Federal and Tribal Disputes: With respect to disputes involving costs billed by any Federal Agency or the Tribes, the Dispute Reviewer's decision shall be final, but shall not constitute final agency action for purposes of initiating judicial review unless and until such Federal Agency or Tribes initiate a judicial action to enforce this CO/AOC.

Effect on other Matters: If the Dispute Resolution Process is invoked with respect to a particular matter, all other matters not directly affected thereby shall proceed according to the requirements of this CO/AOC.

XIII. TERMINATION

This CO/AOC shall be terminated in writing by the Parties hereto upon completion of the items set forth in the attached SOW and final payment of all oversight costs and obligations under Section VI of this CO/AOC.

XIV. SIGNATURE IN COUNTERPARTS

This CO/AOC may be signed in counterparts. Upon signature the original signature pages will be forwarded to the Department of Environmental Quality which shall maintain an original copy of the CO/AOC and all original signatures thereto. Copies shall be provided to all parties.

IDAHO DEPARTMENT OF ENVIRONMENTAL QUALITY

By:

C. Stephen Allred, Director
Idaho Department of Environmental Quality

Date

ENVIRONMENTAL PROTECTION AGENCY

By:

Chuck Findley
Acting Regional Administrator
EPA Region 10

Date

UNITED STATES DEPARTMENT OF INTERIOR
BUREAU OF LAND MANAGEMENT

By:

Martha Hahn
Idaho State Director
Bureau of Land Management

Date

UNITED STATES DEPARTMENT OF AGRICULTURE
FOREST SERVICE

By:

Jack A. Blackwell
Regional Forester
U.S.D.A. Forest Service, Region 4

Date

SHOSHONE-BANNOCK TRIBES

By:

Lionel Boyer
Chairman
Fort Hall Business Council

Date

UNITED STATES DEPARTMENT OF INTERIOR
BUREAU OF INDIAN AFFAIRS

By: _____

Name: _____

Title: _____

Bureau of Indian Affairs

Date

UNITED STATES DEPARTMENT OF INTERIOR
FISH AND WILDLIFE SERVICE

By:

Name: _____

Title: _____

Fish and Wildlife Service

Date

J. R. SIMPLOT COMPANY

By:

Ronald N. Graves
Vice President and Secretary

Date

NU-WEST INDUSTRIES, INC.

By: _____

Name: _____

Title: _____

Date

RHODIA, INC.

By:

Name: _____

Title: _____

Date

FMC CORPORATION

By:

Robert J. Fields
Division Manager

Date

P4 PRODUCTION, L.L.C.

By:

Bruce Pallante
Plant Manager and Assistant Secretary

Date

**AREA WIDE INVESTIGATION SCOPE OF WORK
SOUTHEAST IDAHO PHOSPHATE MINING RESOURCE AREA
PREPARED BY IDAHO DEQ**

Introduction

The Area Wide Investigation is a limited interagency-driven investigation designed to assess ecological and human health impacts from past mining operations, and to support agency-lead remedial activities in the Southeast Idaho Phosphate Mining Resource Area (Resource Area; See Exhibit 1). This investigation is separate and distinct, in that official Interagency technical conclusions will be developed, from the Resource Area investigations conducted by the Selenium Subcommittee of the Idaho Mining Association (IMA) or the Interagency/Phosphate Industry Selenium Working Group; or from any future site-specific remedial investigations.

As set forth in the Memorandum of Understanding (MOU) between federal, state, and tribal governments, signed on or about July 13, 2000, the State of Idaho Department of Environmental Quality (DEQ) is the lead agency for the Area Wide Investigation. The DEQ, with the assistance of a DEQ-retained third-party contractor, is responsible for coordinating the Area Wide Investigation with the other MOU agencies' active participation (including requesting concurrence from each Support Agency on each decision point and on each document developed during the course of the area-wide investigation) in accordance with the terms of the MOU. The primary objectives of the Area Wide Investigation are to:

- 1) Establish area wide remedial action objectives (RAOs), remediation goals (RGs), and risk-based cleanup levels for selenium and other contaminants of concern that will be protective of human health and the environment,
- 2) Develop a monitoring plan that will assess the effectiveness of future remedial activities within the Resource Area,
- 3) Develop Best Available Technologies and Remediation Techniques for use, as appropriate, at sites in the Resource Area, and
- 4) Provide information to support future agency-approved site investigations and remedial actions, and other land use activities on selenium-impacted lands within the Resource Area.

The following individual tasks and subtasks are proposed to meet these objectives in a manner which is not inconsistent with the National Contingency Plan set forth at 40 CFR Part 300, where applicable, and to provide the necessary information for supporting area wide activities. Anticipated work products to be developed in each task are listed

with a tentative schedule provided as Attachment 1. Some tasks will be conducted concurrently and are not restricted to the consecutive order in which they are listed. The actual dates of completion for final products will depend on the availability and sufficiency of existing and/or projected data required to scientifically complete the objectives. Each task will be subject to a detailed scope of work prior to implementation for review and concurrence by the supporting agencies.

Task 1 Assessment of Existing Data and Filling Data Gaps

Purpose: Determine the need for additional data and collect data as needed to accomplish the Area Wide Investigation objectives.

Subtasks

1. **Evaluate existing data** collected as part of the Montgomery Watson work and any other data that may be available from federal, state, tribal and private sector sources for use in the ecological and human health risk assessments and **identify data gaps**. Other ongoing investigations will be considered in determining critical data needs. A Conceptual Site Model (CSM) will be developed and used to help identify data gaps. All existing data will be used to the extent possible to prevent duplication of effort.

Work Products:

Draft CSM
Final CSM
Draft Data Gap Technical Memorandum
Final Data Gap Technical Memorandum

2. **Develop sampling and analysis plan** to fill the data gaps. The sampling plan will be designed to provide the DEQ with the data needed to complete the ecological and human health risk assessments in a time frame that will support future remedial actions. To ensure data consistency and provide for cost efficiencies, IMA's Contractor may be requested to perform portions of the sampling activities associated with filling the identified data gaps. The level of support will be at DEQ's discretion and will be requested of the IMA in a detailed work order format. The resulting work plans developed by IMA's Contractor will be subject to DEQ's approval and will be incorporated into enforceable agreements subject to the terms and conditions of the Area Wide CO/AOC. A DEQ-designated Quality Assurance Monitor may accompany the IMA's sampling team during any sampling events. In instances where a DEQ-designated Quality Assurance Monitor does not accompany the IMA's sampling team, the IMA's contractor may be requested to provide split samples to DEQ, at the Agency's discretion. DEQ reserves the right to use their own employees or Contractors to implement any studies or sampling activities the agency feels warranted including QA/QC verifications.

Work Products: IMA Work Order Request
Draft Sampling and Analysis Plan (SAP)
Final SAP
Data Summary Report (DSR)

Task 2 Completion of Ecological and Human Health Risk Assessments

Purpose: Complete risk assessments to identify contaminant sources, exposure pathways, receptors, and to provide data to support risk management decision-making. EPA risk protocols will be used by DEQ to guide its Resource Area risk characterization. Exposure scenarios will be identified to reflect the range of conditions and multi-use functions found in the Resource Area and to represent human health exposure scenarios.

Subtasks

1. Assess adequacy of previous risk characterization work by reviewing the methodology utilized by Montgomery Watson. The work will be reviewed for consistency with acceptable practice and appropriateness for Resource Area risk characterization to include consideration of traditional and cultural perspectives presented by the Shoshone-Bannock Tribes.

Work Product: Review and Recommendation Memorandum

2. Develop protocols to complete risk assessments utilizing, as appropriate, the work previously performed by Montgomery Watson and other data generating sources. The comments developed from the Review and Recommendation Memorandum, and appropriate references, will be used to develop Agency-accepted risk assessment protocols.

Work Products: Draft Protocol Technical Memorandum
Final Protocol Technical Memorandum

3. Complete risk assessments according to approved protocols which may include deterministic or probabilistic methods where appropriate as determined by DEQ in its discretion and with the concurrence of the Federal Agencies and the Tribes as provided for in the MOU. In any circumstance where DEQ, the Federal Agencies and Tribes decline to utilize probabilistic methods, the Companies reserve the right to perform such analysis at their own expense and to offer said analysis for consideration by the DEQ, Federal Agencies and Tribes. DEQ, the Federal Agencies and Tribes will include any such analysis submitted by the Companies in the administrative record regarding any decisions based upon risk assessments.

Work Products: Draft Human Health Risk Assessment

Final Human Health Risk Assessment
Draft Ecological Risk Assessment
Final Ecological Risk Assessment

Task 3 Risk Management - Establish RAOs, RGs, and Risk-based Cleanup Levels for Exposure Media

Purpose: Develop Remedial Action Objectives (RAOs) and Remediation Goals (RGs) for the Phosphate Mine Resource Area. The RAOs will generally describe objectives on an area wide basis. The RGs will provide more specific statements of the desired endpoint concentrations or risk levels for each identified exposure route. The area wide RAOs, RGs and risk-based clean up levels (RBCULs) will provide discretionary guidance in assisting the site-specific lead agencies (together with site-specific data) in developing site-specific RAOs, RGs and RBCULs that meet both site-specific and area wide ecological and human health protection goals. Area Wide RAOs will consider loading contributions that may affect future Total Maximum Daily Load (TMDL) requirements to be developed for area drainage basins. ARARs identified in Task 7 will also be considered in developing RAOs, RGs and Clean Up Levels.

Subtasks

1. Develop, together with Agencies and Tribes, Area Wide RAOs and Preliminary RGs for each exposure pathway and media

Work Products: Draft RAO Memorandum
Final RAO Memorandum

2. Develop, together with Agencies and Tribes, Area Wide RGs and Risk-based Cleanup Levels

Work Products: Draft RG and Cleanup Level Technical Memo
Final RG and Cleanup Level Technical Memo

Task 4 - Development of water quality and aquatic monitoring plan

Purpose: Establish a surveillance monitoring plan to determine level of success of site-specific remediation projects within the Resource Area.

Subtasks

- 1) Determine appropriate long-term trend monitoring sites and frequency of monitoring to assess surface and groundwater quality, reclamation vegetation, and soils on an area wide basis, including methodologies and QA/QC protocols. The Area Wide Monitoring Plan will consider, and to the extent possible, integrate the Companies' site-specific monitoring requirements to minimize repetition

and/or redundancy.

- 2) Determine appropriate long-term trend monitoring sites and frequency of monitoring to assess potential biological impacts including bioaccumulation in aquatic trophic levels (e.g. aquatic macroinvertebrates, fishes).
- 3) Prepare Comprehensive Monitoring Plan with a Quality Assurance Project Plan (QAPP) incorporating above elements and any additional items as warranted.

Work Products: Draft Comprehensive Monitoring Plan and QAPP
Final Comprehensive Monitoring Plan and QAPP

Task 5 - Development of Best Available Technology (BAT)/Remediation Techniques Manual for historic sites

Purpose: To develop a comprehensive list of available remediation techniques (and innovative technology currently in development) for inactive, past-use sites that have broad applicability and can be applied to other or similar sites in the Resource Area. This list will be used, together with remedial technologies identified during the site specific work (EE/CA's and SI's), to guide response actions.

Subtasks

- 1) Assemble a technical committee of experts from federal/state/tribal agencies, mining companies, and public/private sector to assist IDEQ in compiling a summary of known or existing technologies for inactive/abandoned sites.
- 2) Identify problems that require development of new BATs or remediation techniques, identify potential BATs to address those problems, and recommend potential pilot testing programs for BATs with a high probability of success in Area Wide applications. Implementation of the pilot testing program would not be a part of the Area Wide Investigation (part of the recommendation would be how to implement the pilot project).

Work Products: Draft BATs/Remediation Techniques Guidance Manual
Final BATs/Remediation Techniques Guidance Manual

Task 6 - Public Involvement/Participation Activities

Purpose: To ensure the participation and continued dissemination of information to interested members of the public including any special measures necessary to provide information and an opportunity to participate to tribal members. This process will be specific to the Agency-lead Area Wide Activities and may be supplemented by public

involvement activities being conducted by the IMA and former Selenium Working Group participants. However, the IMA and former Selenium Working Group representatives will not, except as set forth specifically by agreement, communicate agency positions to the public. The following tasks will be performed in support of Public Involvement.

1. Develop a formal Community Relations Plan that details public information efforts, projected public comment periods, location of public information repositories, and summary of interested public and private individuals and organizations.
2. Develop and plan periodic Public Information Meetings summarizing the status and results of Area Wide activities.
3. Establish and maintain Administrative Record and public information repository.

Work Products:

Draft Community Relations Plan
Final Community Relations Plan
Administrative Record

Task 7 – Other Activities to Support Future Operations and Remedial Actions in the Resource Area

Purpose: Develop information that is specifically needed to support future agency-approved remedial actions and other land use activities. Agencies and Mining Companies will be consulted as to additional activities that may need to occur under this task. The following tasks have been identified as critical information support items.

1. Identify ARARs (including other information "to be considered" (TBC)) for the Resource Area that pertain to RAOs, RGs and risk-based clean up levels. The federal agencies and tribal representatives will be asked for assistance in summarizing their respective ARARs. The ARARs will be used as appropriate to support future agency-approved remedial actions in the Resource Area.

Work Products:

Draft ARAR Summary
Revised ARAR Summary

2. Assist federal, tribal and state land management agencies, as requested, in developing guidelines for livestock grazing on selenium-impacted lands. Policy statements pertaining to this issue will be authored by the appropriate implementing agencies.
3. Coordinate and draft official interagency responses, data interpretations and

technical conclusions in support of Area Wide Investigation decision-making and policy development.

4. With site-specific lead agencies, participate in the development of generic site-specific scope of work templates that address area wide goals and may be used, as appropriate, on a site-specific basis to facilitate interagency consistency in investigative and remedy phases of future site-specific remedial activities. However, lead agencies may choose to proceed with site-specific activities prior to the finalization of any associated template.
5. Incorporate relevant site-specific data, as developed, into applicable Area Wide Investigation objectives.
6. Consistent with the MOU and with the parties' obligations under any order or agreement with the responsible mining companies, continue coordination with the IMA Se Committee members and the DEQ Se Area Wide Advisory Committee (SeAWAC, former Se Steering Committee) participants to encourage cooperative efforts, where practicable. Membership in the SeAWAC shall include at least one representative from each mining company and a representative from any state, local or national public interest groups, or state or local government, expressing a desire to participate. At a minimum, the DEQ will solicit comments from the SeAWAC participants on drafts of the *Site-specific Statement of Work Template*, *Data Gap Analysis Technical Memorandum*, *2001 Area Wide Sampling Plan*, and *Area Wide Monitoring Program*, *Risk Assessment Protocol Technical Memorandum*, *Risk Assessment Results* and *Area Wide Risk Management Guidance Document (including suggested RBCLs)*. To allow for potential schedule constraints, this committee review process may be conducted through electronic correspondence with the approval of the participants. Additionally, the DEQ will conduct formal 30-day public comment periods for the *Risk Assessment Protocol Technical Memorandum*, *Risk Assessment Results* and *Area Wide Risk Management Guidance Document (including suggested RBCLs)*.
7. Interact with Shoshone-Bannock Tribes and Bureau of Indian Affairs to develop and consider a traditional and cultural perspective into the Area Wide Investigation risk assessment work.